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"THERE WILL BE WARS AND RUMOURS OF WARS": A COMPARISON OF THE TREATMENT OF DEFENCE AND EMERGENCY POWERS IN THE FEDERAL CONSTITUTIONS OF AUSTRALIA AND CANADA

By CHRISTOPHER D. GILBERT*

I. INTRODUCTION

As the decade of the eighties opens, the Western and Eastern blocs are once again involved in rumours of wars, talk of extensive re-armament in the NATO countries and a good deal of sabre-rattling. Canadian and Australian lawyers, along with their American counterparts, are thus faced with the awesome prospect of possibly living in a war, or semi-war, situation. In federations such as Canada and Australia, this means that the lawyer may have to contemplate the system of constitutional jurisprudence that he serves being "virtually engulfed by that mammoth among federal powers,"¹ the defence and emergency power.

Against this background of military and political uncertainty, it is timely to review those aspects of the jurisprudence of the Canadian and Australian constitutions that relate to the legislative powers of the respective national parliaments to deal with war-time emergencies. Since the build-up to, and

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¹ Murphy, *The War Power of the Dominion* (1952), 30 Can. B. Rev. 791, at 791.

wind-down from, war and related emergencies are seldom clear-cut, but will often involve transitional periods from peace to war and *vice versa*, this paper also examines the capacity of the Canadian and Australian federal parliaments to deal with emergencies that do not necessarily relate directly to war or semi-war situations. War may be the ultimate in emergency, but in these perilous economic and social times, emergency may sometimes wear a decidedly non-military aspect. Canadian and Australian parliamentary powers to deal with non-military emergencies thus also feature in the following discussion.

II. DEFENCE AND NATIONAL EMERGENCY: THE TWO CONSTITUTIONAL BACKGROUNDS

It is the theme of this paper that, although the relevant provisions of the Australian and Canadian federal constitutions are to some extent different, the legislative powers of the two federal parliaments to deal with war crises and related national emergencies are broadly similar. One brief, but by no means insubstantial, *caveat* must be entered respecting this general statement: the Canadian courts have interpreted the Canadian constitution so as to confer significantly greater emergency power upon the national parliament in times of peace than have the Australian courts. Before this proposition is examined in detail, the constitutional settings of the defence and emergency powers in Australia and Canada must first be outlined.²

Just as the Canadian federal constitution is contained in a British Imperial statute, the *British North America Act, 1867*,³ so too the Australian federal constitution is contained in an Act of the Imperial Parliament, the *Commonwealth of Australia Constitution Act*.⁴ The Australian constitution is generally similar to the Canadian, in that both instruments envisage a federal form of government. Certain powers of "national" importance are given to a central parliament and others of more "local" relevance are conferred upon the provincial (or, in the case of Australia, state) legislatures.

The way in which legislative power is distributed in the two constitutions is very different, however, and this difference will be seen, in the course of this discussion, to have certain important consequences. To begin with, and perhaps most importantly, the Australian constitution differs from the

² Apart from legislation, another source of emergency powers in both federations (at least in a military context) is the war prerogative of the Crown. However, apart from its traditional use in the declaring of war and the calling-out of the armed forces, the prerogative has been little used in 20th century Canadian and Australian emergencies; both countries have almost exclusively preferred to base emergency action on special enabling legislation. The war prerogative in Australia and Canada is vested exclusively in the federal Crown; for Australia, see *Joseph v. Colonial Treasurer* (1918), 25 C.L.R. 32, 24 A.L.R. 185, 35 W.N. 78 (H.C. of Aust.); for Canada, see ss. 15, 91(7) of the *British North America Act 1867* (Imp.), and Marx, *The Emergency Power & Civil Liberties in Canada* (1970), 16 McGill L.J. 39, at 51-56. This paper does not deal with the prerogative, given the preference of Canadian and Australian parliaments for using special emergency legislation.

³ 30 & 31 Vic., c. 3, as am. (Imp.) [hereinafter the *B.N.A. Act*].

⁴ 63 & 64 Vic., c. 12, as am. (Imp.) [hereinafter the Australian constitution].

Canadian in that (with certain minor exceptions immaterial to this article) no specific powers are granted to the Australian states. The only specific powers granted to any polity are those granted to the Australian federal parliament. This is done primarily by two sections: sections 51 and 52. The latter contains a list of four matters that are expressed to be "exclusive" to the Commonwealth parliament (as the Australian federal parliament is often known),⁵ while section 51 confers thirty-nine Heads of Power upon the Commonwealth parliament. These "section 51" Heads of Power are not expressed to be exclusive to the Australian parliament, and it is now generally established that the powers listed in section 52 and 51 are concurrent,⁶ although a valid Commonwealth law will prevail in the event of conflict with a competing state law.⁷ The "residue" of power left over after the Australian constitution has granted specific powers to the Commonwealth parliament and government constitutes the legislative powers of the Australian states. The residual nature of this power is expressly recognized and guaranteed by section 107 of the Australian constitution.⁸

Therefore, one must turn attention to those sections of the two constitutions that confer legislative power, either exclusive or concurrent, upon the respective federal parliaments: section 51 of the Australian constitution⁹ and section 91 of the *B.N.A. Act*. It is in these two provisions that one finds respectively the major locations of the defence and emergency powers of the Australian and Canadian federal parliaments.

In the Australian constitution, the legislative power respecting defence is found in paragraph (vi) of section 51: a power to make laws with respect to, "The naval and military defence of the Commonwealth and of the several states, and the control of the forces to execute and maintain the laws of the Commonwealth." In its formal expression, the Australian defence power is not clearly exclusive to the Commonwealth; none of the powers listed in section 51 of the Australian constitution is. In spite of the general concurrency of most "section 51" powers, however, it is fairly clear that, at least in its purely military aspect,¹⁰ section 51(vi) of the Australian constitution was intended by the framers of the constitution to be exclusive of the states. One only need take into account section 114, which prohibits the states from maintaining armed forces without Commonwealth consent; section 69, which transfers to the Australian Commonwealth, *inter alia*, the old colonial de-

⁵ See, e.g., Australian constitution, s. 1.

⁶ See Lumb and Ryan, *Constitution of the Commonwealth of Australia Annotated* (2d. ed. Sydney: Butterworths, 1977) at 71. Some of the "s. 51" list are, however, exclusive by their very nature, e.g., s. 51(iv), (xxx), (xxxi).

⁷ Australian constitution, s. 109.

⁸ *R. v. Phillips* (1970), 125 C.L.R. 93 at 116, 44 A.L.J.R. 497 at 505 (H.C. of Aust.).

⁹ For present purposes, the small "federal" list in s. 52 is largely irrelevant.

¹⁰ In relation to the question of the economic organization of the country during war-time, it appears that the states do have a concurrent power with the Commonwealth in this aspect of defence; see *Carter v. Egg & Pulp Mktg. Bd.*, (1942), 66 C.L.R. 557, [1943] A.L.R. 1, 16 A.L.J. 310 (H.C. of Aust.).

partments of naval and military defence maintained by each of the Australian states in pre-Federation days; and section 68 which constitutes the Governor-General the Commander-in-Chief of the Australian armed forces.

Turning to the *B.N.A. Act*, one finds a similar intention on the part of its framers to make the matter of defence an exclusive matter for the parliament of Canada. Thus, the seventh Head of section 91 confers upon the federal parliament the power to make laws on all matters coming within the classes of subjects of "Militia, Military and Naval Service, and Defence." Furthermore, amongst the types of provincial public works and property that were to vest in the federal government of Canada upon Confederation, pursuant to section 108 and the third schedule of the *B.N.A. Act*, were: military roads, armouries, drill sheds, military clothing, and munitions of war. Also, section 15 vests the command-in-chief of all Canadian naval and military forces in the Crown.¹¹

Despite the similarity of constitutional language, however, the course of constitutional interpretation in Australia has located the Commonwealth's defence and emergency powers primarily in section 51(vi) of the Australian constitution, while the Canadian courts have rested those of the Canadian parliament not primarily on section 91(7) of the *B.N.A. Act*, but on the "federal general" or "peace, order, and good government" power in the opening words of section 91.

The last major point of general comparison in Canadian and Australian constitutional provisions to be considered before embarking on a more detailed survey of the law in both countries is the difference in structure of section 51 of the Australian constitution as compared with section 91 of the *B.N.A. Act*. Section 51 commences thus: "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: . . ." The thirty-nine heads of enumerated subject-matter follow, of which defence is the sixth head or paragraph. In other words, section 51 confers no legislative powers *other than* those comprising the thirty-nine headings. Compare this with the preamble of section 91 of the *B.N.A. Act*:

It shall be lawful for the [Canadian parliament] to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that [notwithstanding anything in this Act] the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; . . .

Then are enumerated the thirty-one heads of legislative power in the remainder of section 91. In contradistinction to the Australian constitution's section 51, it is quite clear that the thirty-one heads of power in 91 are not

¹¹ In view of the constitutional conventions (common to both Australia and Canada) concerning the monarchy and the office of Governor-General, the difference between this provision and s. 68 of the Australian constitution is one of mere form.

intended to exhaust the disposition of power effected by the section; the thirty-one heads are in addition to a *separate* power included in the preamble.¹² That this difference in the structures of the Australian section 51 and the Canadian section 91 results in the Canadian parliament's possessing a legislative power in addition to the enumerated heads of section 91 (a type of power not granted to the Australian parliament by section 51) was recognized as long ago as 1914, by comments of the Privy Council in a case on appeal from the High Court of Australia, *A.G. for the Commonwealth of Australia v. Colonial Sugar Refining Co. Ltd.*,¹³ in which Viscount Haldane contrasted section 91 of the *B.N.A. Act* with section 51 of the Australian constitution in much the same way as outlined here.

It is beyond the scope of this paper to re-plough the arguments as to the limits and definition of the federal general power in section 91 of the *B.N.A. Act*. The literature and case law on this point are sufficiently exhaustive already. Whether one opts for the "gap" theory,¹⁴ or the "national dimensions" test,¹⁵ or the "discrete matter of inherent unity" approach,¹⁶ this much seems to be settled about the scope of the power in the preamble to section 91: it does support federal laws aimed at dealing with a wide range of matters that confront the nation in time of war and its immediate aftermath. These matters are not restricted to questions purely military, but indeed embrace much of the national economic organization necessary to modern warfare.¹⁷ From the Australian point of view, section 51(vi) of the Australian constitution has played an almost identical role in war-time.¹⁸ The federal general power in section 91 of the *B.N.A. Act*, however, has now been extended in its constitutional reach to embrace a phenomenon that, in Australia, has so far been beyond the ambit of section 51(vi), or any other section, of the Australian constitution: federal legislation attempting to deal with national crises that are in no way associated with military emergencies.¹⁹

Attention is now turned to the various kinds of emergencies, military

¹² The author of the *Report to the Canadian Senate of the Parliamentary Counsel Relating to the British North America Act 1867, (O'Connor Report)* (Ottawa: King's Printer, 1939) would have violently disagreed with this appreciation of the office of the preamble to s. 91. Nevertheless, Professor Hogg appears to be right in stating that, in practice, the Canadian courts have adhered to a view similar to that advanced in the text: see Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1977) at 244.

¹³ [1914] A.C. 237 at 253, 255, 17 C.L.R. 644 at 651-52, 653-54, 20 A.L.R. 22 at 26, 27 (P.C.).

¹⁴ E.g., *Citizens Ins. Co. of Canada v. Parsons* (1881), 7 App. Cas. 96 at 116-17 (P.C.), also Hogg, *supra* note 12, at 245-46.

¹⁵ E.g., *A.G. Ont. v. A.G. Can. (Local Prohibition)*, [1896] A.C. 348, 5 Cart. B.N.A. 295 (P.C.); *A.G. Ont. v. Can. Temperance Fed'n.*, [1946] A.C. 193, [1946] 2 D.L.R. 1 (P.C.).

¹⁶ E.g., Lederman, *Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation* (1975), 53 Can. B. Rev. 597; also the judgment of Beetz J. in *Reference Re Anti-Inflation Act*, [1976] 2 S.C.R. 373, 68 D.L.R. (3d) 452, 9 N.R. 541 [hereinafter the *Anti-Inflation Reference*].

¹⁷ See Part IV of this paper, *infra*.

¹⁸ *Id.*

¹⁹ See Part VII of this paper, *infra*.

and otherwise, that federal parliaments in Australia and Canada have attempted to deal with legislatively, and to how these attempts have fared, constitutionally, in the courts of the countries. The discussion that follows is divided into five broad categories: defence laws in non-emergency times; war as the supreme emergency; war's aftermath as an emergency; preparation for apprehended war; and a type of emergency that may best be described as "peace-time emergency."

III. DEFENCE LAWS IN NON-EMERGENCY TIMES

It is recognized in both Canada²⁰ and Australia²¹ that, in times of what may be called "profound" peace (no major war-clouds gathering on the international horizon), the defence and emergency power at its narrowest ambit embraces an ability to pass laws relating to the establishment, training, equipment and general regulation of what might be called the traditional military forces. In times of peace as well as war, therefore, federal legislative competence in both countries includes such traditional military matters as the recruitment of personnel, voluntarily or by way of conscription; the erection of forts, naval dockyards, airfields, military hospitals and the like; and the manufacture or acquisition of munitions and weaponry.

In Australia, such laws on matters traditionally military are sometimes said to be examples of the "primary aspect"²² (the central or traditional core) of the power in section 51(vi) of the Australian constitution. An instructive example of this "primary aspect" in operation is the decision of the High Court of Australia in *A.G. for Victoria v. The Commonwealth of Australia*.²³ An Australian government clothing factory was established and operated pursuant to Commonwealth defence legislation for the purpose of making uniforms for armed forces personnel. After the First World War, with the concomitant decrease in purely military work, the factory accepted orders for non-military uniform clothing from bodies such as state police forces and public municipal bodies. The factory continued production for military purposes as well. The factory's non-military work was objected to, because it was allegedly not supported by any Commonwealth power under section 51(vi) of the Australian constitution. The defendant Commonwealth argued that it was within section 51(vi) to keep a defence establishment at full productive capacity by way of accepting some non-military work, because the facility would retain full efficiency in case of an expanded future military need. A majority of the Court accepted the Commonwealth's argument, holding that a certain amount of non-military work was reasonably incidental to

²⁰ Murphy, *supra* note 1, at 797-98.

²¹ Wynes, *Legislative, Executive and Judicial Powers in Australia* (5th ed. Sydney: Law Book Co., 1976) at 202-203.

²² The phrase is taken from the judgment of Fullagar J. in *Australian Communist Party v. Cth.* (1950-51), 83 C.L.R. 1 at 254 (H.C. of Aust.).

²³ (1935), 52 C.L.R. 533 (H.C. of Aust.) [hereinafter the *Clothing Factory* case]. Interestingly, Fullagar J. in the *Australian Communist Party* case, *id.* at 254, thought the *Clothing Factory* case a "border-line example" of the Australian defence power's primary aspect.

maintaining the facility at full efficiency, an objective that was clearly within the ambit of section 51(vi).²⁴

The ambit of the "primary aspect" of section 51(vi) in peace-time, however, cannot be pushed too far. By way of contrast with the *Clothing Factory* case, an earlier High Court decision should be noted: *Commonwealth of Australia v. Australian Commonwealth Shipping Board*.²⁵ In this case, decided nine years before the *Clothing Factory* case, the defendant shipping board conducted the business of owning, operating and repairing ships and dockyards, pursuant to Commonwealth merchant shipping legislation. As part of its normal business, the board contracted to supply electrical generating equipment to a non-Commonwealth-owned power station. This aspect of the board's operations was objected to as being not authorized by the board's constituting statute; even if it was, the statute was *ultra vires* any Commonwealth constitutional power, including section 51(vi). On the constitutional point, the defendant urged the "efficiency" argument, similar to that which was ultimately to be successful in the *Clothing Factory* case. In the *Shipping Board* case, while all the Court held the board's commercial contracting activities to be unauthorized by the board's statute, four out of the six justices considered the section 51(vi) argument explicitly and rejected the defendant's submission. The following extract sums up the majority view: "Despite the practical difficulties facing the Commonwealth in the maintenance of its dockyard and works, the power of naval and military defence does not war-

²⁴ It may be wondered why the Commonwealth was forced to justify the factory's non-defence activities as being incidental to a valid federal defence purpose. After all, if the Commonwealth chooses to expend part of its revenues upon the establishment and operation of an undertaking that, *inter alia*, supplies goods to persons who voluntarily decide to do business with that undertaking, then surely the "spending" and "contracting" powers of the Commonwealth are a sufficient justification in themselves. Unlike the apparent Canadian situation, however—see Hogg, *supra* note 12, at 68-72, cases cited at 73n. 33—there is in Australia controversy about the federal contracting and spending powers. It is unsettled as to whether the spending power (Australian constitution, s. 81) is unlimited as to purpose and object, or limited to those areas of responsibility allocated to the Commonwealth by the Australian constitution. The case-law is highly equivocal on this point: see *A.G. Vict. ex rel. Dale v. Cth.* (1945), 71 C.L.R. 237, [1945] A.L.R. 435, 19 A.L.J. (H.C. of Aust.); *Vict. v. Cth.*, (1975), 134 C.L.R. 338, 50 A.L.J.R. 157 (H.C. of Aust.). See also Lumb and Ryan, *supra* note 6, at 288-92; Wynes, *supra* note 21, at 353-56. (The Commonwealth *does* possess, in s. 96 of the Australian constitution, a power to make financial grants to the States on practically any terms, even those that lie beyond the Commonwealth's areas of constitutional concern: see *S. Aust. v. Cth.* (First Uniform Tax case), (1942), 65 C.L.R. 373, [1942] A.L.R. 186, 16 A.L.J. 109 (H.C. of Aust.); *Vict. v. Cth.* (Second Uniform Tax case) (1957), 99 C.L.R. 575 (H.C. of Aust.). Of course, s. 96 does not apply to the funding of entities other than a State.) Similarly, in the *Clothing Factory* case, *supra* note 23, the Commonwealth's contracting power would have been of doubtful value in upholding the validity of the non-military transactions; it can be strongly argued that Australian law prevents the Commonwealth executive from entering into contracts dealing with matters *ultra vires* the Commonwealth: see *Cth. v. Colonial Combing, Spinning and Weaving Co.* (the Wooltops case) (1921-22), 31 C.L.R. 421, 29 A.L.R. 138 (H.C. of Aust.); *Cth. v. Aust. Cth. Shipping Bd.*, *infra* note 25; *Re K.L. Tractors Ltd.* (1960-61), 106 C.L.R. 318, [1961] A.L.R. 410, 34 A.L.J.R. 481 (H.C. of Aust.). See also Lumb and Ryan, *op. cit.*, at 227-30; Wynes, *op. cit.*, at 389n. 37.

²⁵ (1976) 39 C.L.R. 1, [1972] A.L.R. 61 (H.C. of Aust.).

rant these activities in the ordinary conditions of peace whatever be the position in time of war. . . ."²⁶

In the *Clothing Factory* case, the majority of the High Court distinguished the *Shipping Board* case on the basis that the shipping board had not been established primarily from a defence point of view. The board's statute did not purport to deal with naval and military matters; it merely established a government shipping line. The clothing factory had been established under armed forces legislation; "the purpose of naval and military defence [had] been impressed upon the operations of the clothing factory from the very commencement."²⁷

Some commentators on these two decisions suggest that the difference in the world situation between 1926 (the *Shipping Board* case) and 1935 (the *Clothing Factory* case) explains the High Court's more expansive view of the ambit of section 51(vi) of the Australian constitution in the latter case. They point to the world's state of relative peace in 1926 and compare it with the world scene in 1935 when Germany and Japan were behaving increasingly aggressively and there was talk of a general war.²⁸ This might be so, although there is no hint of any such factor being raised before, let alone being determined by, the Court in the *Clothing Factory* case. Another comment is perhaps on firmer ground with the suggestion that the Court in the *Clothing Factory* case simply changed its mind about what was considered reasonably incidental to the maintenance of defence forces in time of peace, and, in effect, overruled the *Shipping Board* case.²⁹

Indeed, it would seem to be a reasonable view that an undoubted constitutional power to establish and maintain facilities for provisioning the military should include a power to keep that facility's efficiency at a fair level by means that do not unduly displace its basic "defence" nature. Yet it might be persuasively argued that as the essentially military nature of the facility becomes more like that of an ordinary business undertaking, it is more likely that the means adopted to maintain the facility's viability will be unconstitutional, so far as the defence and emergency power in peace-time is concerned.³⁰

In Canada it seems likely that Canadian federal legislative power over the traditional military establishment should be ascribed to section 91(7) of the *B.N.A. Act*, rather than to the general power in section 91.³¹ It probably makes little practical difference which view is adopted; if nothing else, the former view at least has the advantage of rescuing section 91(7) from being

²⁶ *Id.* at 9 (C.L.R.), 64 (A.L.R.).

²⁷ *Clothing Factory* case, *supra* note 23, at 559 (C.L.R.), 251 (A.L.R.).

²⁸ Lumb and Ryan, *supra* note 6, at 105.

²⁹ Sawyer, *Defence Power of the Commonwealth in Time of Peace* (1952-54), 6 Res. Judicatae 214, at 217.

³⁰ This point is developed in some detail by Derham, "The Defence Power," in Else-Mitchell, ed., *Essays on the Australian Constitution* (2d. ed. Sydney: Law Book Co., 1961) especially at 168-74.

³¹ Murphy, *supra* note 1, at 797-98.

a complete dead letter in the Canadian constitution. One other advantage of this view is that it emphasizes the special and extraordinary nature of the emergency power included in the preamble to section 91. Section 91(7) is where one would expect to find the location of legislative power over the traditional military establishment, while the extraordinary social and economic organizational powers inherent in the conduct of modern war by a major industrial nation are more appropriately located under the special emergency power that the courts have discovered in the opening phrases of section 91 of the *B.N.A. Act*.³²

To the extent that the Canadian courts have considered section 91(7) at all—and they have not often done so—the decided cases support this suggested bifurcation of Canadian defence and emergency power between section 91(7) and the general power in section 91. For instance, the power to acquire land for military purposes was mentioned as a proper function for section 91(7) in *L'Union St. Jacques de Montréal v. Bélisle*;³³ the Canadian parliament's power to constitute a "master and servant" relationship between the Crown and a member of the Canadian armed forces, for tort law purposes, was ascribed to section 91(7) in *A.G. Can. v. Nykorak*;³⁴ section 91(7) was also considered to be the source of the Canadian parliament's power to pass legislation regulating the status of personnel in the American armed forces stationed in Canada during World War II;³⁵ while the Canadian parliament's exclusive jurisdiction over members of the Canadian defence forces under section 91(7) was held, in *R. v. Anderson*,³⁶ to be the major reason for holding provincial driving licence laws inapplicable to a member of the Canadian defence forces while driving a military vehicle on duty.

These cases relate quite obviously to matters concerning the administration of the traditional military establishment. Their ascription to section 91(7) of the *B.N.A. Act*, rather than to the general power in section 91, seems eminently in accord with the scheme of sections 91 and 92. On the other hand, Canadian federal legislation directed at the social and economic organization of the nation during wartime—laws which would otherwise clearly trespass upon provincial ground marked out in section 92—has always been justified under the general power in section 91.

³² *Id.* at 798.

³³ (1874) L.R. 6 P.C. 31 at 37.

³⁴ [1962] S.C.R. 331, 37 W.W.R. 660.

³⁵ *Re Exemption of U.S. Forces from Canadian Criminal Law*, [1943] S.C.R. 483, [1943] 4 D.L.R. 11, 80 C.C.C. 161.

³⁶ (1930), 39 Man. R. 84, [1930] 2 W.W.R. 595, 54 C.C.C. 321 (C.A.). By contrast, an almost identical situation in Australia resulted in the conviction of the soldier-driver: *Pirrie v. McFarlane* (1925), 36 C.L.R. 170, 31 A.L.R. 365 (H.C. of Aust.). In Canada, however, provincial laws are sometimes applicable to soldiers, even on federally-owned military property: see *R. v. Smith*, [1942] O.W.N. 387, [1942] 3 D.L.R. 769, 78 C.C.C. 44 (C.A.), where provincial game laws were held applicable to a soldier on a military reserve. In Australia, the laws of a contiguous State do not apply to a Commonwealth military base, in the absence of Commonwealth laws applying and adopting state laws: see *Worthing v. Rowell & Muston Pty. Ltd.* (1969-70), 123 C.L.R. 89, 44 A.L.J.R. 230 (H.C. of Aust.); *R. v. Phillips* (1970), 125 C.L.R. 93 (H.C. of Aust.).

IV. WAR AS THE SUPREME EMERGENCY

In the *Anti-Inflation Reference*,³⁷ Beetz J. of the Supreme Court of Canada made an instructive comment, as applicable to Australia as it is to Canada, on the effect of the emergency power of the Canadian parliament: "in practice, the emergency operates as a partial and temporary alteration of the distribution of powers between Parliament and the Provincial legislatures."³⁸ This *dictum*, although made in the context of a "peace-time" emergency, is equally illustrative of the constitutional position in both Australia and Canada in time of outright war.

In Canada, the emergency power of the parliament to regulate the social and economic, as well as purely military, aspects of the nation's involvement in total war has been located by the courts in the general power in the opening words of section 91 of the *B.N.A. Act*.³⁹ In Australia, a war power sufficient to enable the Australian Commonwealth parliament to regulate almost all social and economic aspects of modern war has been deduced by the High Court from section 51(vi) of the Australian constitution. It is thus correct to say that, in both Australia and Canada, the defence and emergency powers in both constitutions enable the respective federal parliaments and governments to largely, if not entirely, obliterate the distribution of powers between central and regional legislatures in time of outright war.

The potential scope of section 51(vi) of the Australian constitution in time of war was measured as far back as 1916, when Commonwealth regulations fixing bread prices during World War I were attacked as being *ultra vires* section 51(vi), in the case of *Farey v. Burvett*.⁴⁰ The basic argument was that section 51(vi) should be restricted to authorizing purely "naval and military" laws, and that commodity pricing and regulation remained with the Australian states, which would clearly be the peace-time position. A majority of the High Court rejected this narrow construction of the section and held that the defence power in the section was wide enough to embrace economic and social regulation in wartime by the federal authorities, so long as such regulation could be seen by the Court to have some capability to assist the overall war effort.⁴¹ The control of basic commodities such as bread clearly fell within such a test.

The *Farey v. Burvett* approach to section 51(vi) of the Australian constitution has prevailed ever since.⁴² The approach involves an "elastic" concept of the defence and emergency power; the power will expand in wartime, far beyond its ordinary peace-time application to matters purely military (the

³⁷ *Supra* note 16.

³⁸ *Id.* at 461 (S.C.R.), 527 (D.L.R.), 621 (N.R.).

³⁹ See, e.g., *Fort Frances Pulp & Paper Co. v. Man. Free Press*, [1923] A.C. 695, [1923] 3 D.L.R. 629 (P.C.); *Co-op. Comm. on Japanese Canadians v. A.G. Can.*, [1947] A.C. 87, [1947] 1 D.L.R. 577 (P.C.); *Re the Validity of Wartime Leasehold Regulations*, [1950] S.C.R. 124, [1950] 2 D.L.R. 1 [hereinafter the *Wartime Leaseholds reference*].

⁴⁰ (1916), 21 C.L.R. 433, 22 A.L.R. 201 (H.C. of Aust.).

⁴¹ *Id.* at 441-43, 455 (C.L.R.), 204-205, 210 (A.L.R.).

⁴² See Wynes, *supra* note 21, at 203-209.

"primary aspect"), so that economic and social matters now inseparable from the modern idea of total war are brought within its purview. This expanded, non-military aspect of the Australian defence and emergency power is often called the "secondary aspect"⁴³ of section 51(vi). Thus, the ambit of the power will be different from time to time, depending on the severity of the military emergency facing Australia.⁴⁴ This elasticity, or varying applicability, of section 51(vi) has been explained by a former Chief Justice of the High Court of Australia⁴⁵ as flowing from the fact that section 51(vi) has as its object, not a finite topic such as weights and measures,⁴⁶ nor the regulation of a recognized legal phenomenon such as divorce⁴⁷ or bankruptcy,⁴⁸ nor the control of specified human and commercial activity such as interstate and overseas trade and commerce,⁴⁹ but a purpose. A purposive activity such as defence will vary according to the military dangers, great or small, against which the nation may need defence.

Consequently, during both World Wars, the Australian Commonwealth parliament and government exercised legislative and executive powers little different from those exercised by nations with unitary forms of government. The mode of exercise of war-time emergency powers in Australia was similar in both World Wars, and almost identical to that chosen by, *inter alia*, the parliament of Canada during the same periods: the Commonwealth parliament passed statutes (in the First World War, the *War Precautions Act* 1914;⁵⁰ in the Second World War, the *National Security Act* 1939⁵¹) which delegated to the Governor-General in Council power to make regulations covering extremely wide areas of the country's economic, social and military affairs, for the purpose of more effectively prosecuting the war.⁵² During both World Wars, but particularly the Second, numbers of these measures were challenged in the High Court as being *ultra vires* section 51(vi) of the Australian constitution; few challenges, however, were ever successful. A few examples indicate the extent of the Australian Commonwealth's regulation of the national life: detention of suspected persons,⁵³ price control,⁵⁴ manpower

⁴³ This phrase, too, is taken from the judgment of Fullagar J. in the *Australian Communist Party* case: see *supra* note 22.

⁴⁴ *Andrews v. Howell* (1941), 65 C.L.R. 255 at 278 (H.C. of Aust.).

⁴⁵ *Stenhouse v. Coleman* (1944), 69 C.L.R. 457 at 471 *per* Dixon J. (as he then was) (H.C. of Aust.).

⁴⁶ Australian constitution, s. 51(xv).

⁴⁷ *Id.*, s. 51(xxii).

⁴⁸ *Id.*, s. 51(xvii).

⁴⁹ *Id.*, s. 51(i).

⁵⁰ (No. 10 of 1914) as am.

⁵¹ (No. 15 of 1939) as am.

⁵² Both Commonwealth statutes were repealed at the end of their respective wars. The Canadian *War Measures Act*, R.S.C. 1970, c. W-2, has remained on the Canadian federal statute books ever since its enactment, in its original form, in 1914. At the time of writing (February 1980), there is no Australian federal equivalent of the Canadian *War Measures Act* in existence.

⁵³ *Lloyd v. Wallach* (1915), 20 C.L.R. 299 (H.C. of Aust.).

⁵⁴ *Vict. Chamber of Mfrs. v. Cth.* (1943), 67 C.L.R. 335 (H.C. of Aust.).

control,⁵⁵ control of the sale of land and securities⁵⁶ and the control of rents and housing.⁵⁷

Although the Commonwealth exercised thoroughgoing control of the national war effort, not every federal control measure was upheld by the High Court. The Court has emphasized on a number of occasions that the actual efficacy of federal measures in conducting national defence is not for the courts to decide; it is a matter exclusively for the federal parliament and executive government.⁵⁸ But the Court has also maintained the view that, although not concerned with efficacy, Courts must always be satisfied that any impugned measure exhibits some degree of capability to assist the war effort, in order to be supported by section 51(vi). Infrequently, the Court has not been so satisfied, and several federal controls were struck down by the Court during World War II as not manifesting any tendency towards a capability to assist national defence. Thus, for example, federal regulations controlling the number of university admissions, without any accompanying diversion into war work of the persons thereby excluded, were held invalid;⁵⁹ controls on artificial lighting applied inseparably to factories not engaged in war production as well as those that were, were struck down;⁶⁰ while regulations subjecting associations deemed subversive (in this case, the Jehovah's Witness religious sect) to permanent dissolution and permanent confiscation of property were invalidated as being too severe a way of dealing with an emergency situation.⁶¹ (Presumably dissolution and confiscation for the war's duration only would have been held valid.)

In view of the Australian experience, it comes as a notable contrast to remark the Canadian situation. Apart from several minor instances,⁶² judicial exposition of the Canadian emergency power in war-time has usually occurred either in cases where federal legislation was invalidated because of the *absence* of emergency,⁶³ or in cases where the justifying emergency consisted in the transitional period of war's aftermath.⁶⁴ Nevertheless, despite their numerical scarcity, the Canadian cases reveal a war power which, in its secondary or non-military aspect, is every bit as comprehensive as the Australian one.

⁵⁵ *Reid v. Sinderberry* (1944), 68 C.L.R. 504, [1944] A.L.R. 205, 18 A.L.J. 58 (H.C. of Aust.).

⁵⁶ *Shrimpton v. Cth.* (1945), 69 C.L.R. 613, [1945] A.L.R. 125, 19 A.L.J. 25 (H.C. of Aust.).

⁵⁷ *Real Estate Inst. of N.S.W. v. Blair* (1946), 73 C.L.R. 213, [1946] A.L.R. 499, 20 A.L.J. 261 (H.C. of Aust.).

⁵⁸ *E.g.*, *supra* note 22, at 199, 255.

⁵⁹ *R. v. Univ. of Sydney* (1943), 67 C.L.R. 95, [1943] A.L.R. 227, 17 A.L.J. 103 (H.C. of Aust.).

⁶⁰ *Vict. Chamber of Mfrs. v. Cth.* (1943), 67 C.L.R. 413 (H.C. of Aust.).

⁶¹ *Adelaide Co. of Jehovah's Witnesses Inc. v. Cth.* (1943), 67 C.L.R. 116, [1943] A.L.R. 193, 17 A.L.J. 134 (H.C. of Aust.).

⁶² *E.g.*, *Re Gray* (1919), 57 S.C.R. 150, 42 D.L.R. 1, [1918] 3 W.W.R. 111; *Re the Validity of Chemicals Regulations*, [1943] S.C.R. 1, [1943] 1 D.L.R. 248, 79 C.C.C. 1.

⁶³ *E.g.*, *Re Bd. of Commerce Act & Combines and Fair Prices Act*, [1922] 1 A.C. 191, 60 D.L.R. 513, [1922] 1 W.W.R. 20 (P.C.).

⁶⁴ *E.g.*, the *Fort Frances* case, *supra* note 39.

The idea that the general power in section 91 of the *B.N.A. Act* comprehends federal incursion into areas of provincial jurisdiction during periods of national emergency was first suggested in the *Board of Commerce* case.⁶⁵ In a subsequent case, the Privy Council even framed a very early decision, *Russell v. The Queen*,⁶⁶ in "national crisis" terms by suggesting that federal temperance legislation applying nation-wide had been needed to combat alcoholism in order to "protect the nation from disaster."⁶⁷ Though this suggestion has been rightly viewed with indignation,⁶⁸ hilarity⁶⁹ and even as being in plain error,⁷⁰ the concept of federal legislation properly invading provincial jurisdiction during a national crisis took root.

In the *Board of Commerce* case,⁷¹ the Privy Council struck down, as invading provincial jurisdiction, federal legislation controlling unfair profits and the hoarding of necessities. Their lordships stated that special circumstances, such as a great war, might well operate to bring within federal jurisdiction matters such as profits and hoarding.⁷² The Privy Council, however, specifically noted, *inter alia*, that the laws were not enacted during World War I to meet special needs, but during peace-time. Furthermore, the legislation was not limited to a temporary purpose or time, but was intended to be permanent.⁷³ Similarly, in *Toronto Electric Commissioners v. Snider*,⁷⁴ the Privy Council rejected, among several other arguments, the suggestion that a national industrial emergency justified the invasion of provincial jurisdiction occasioned by the federal *Industrial Disputes Investigation Act*.⁷⁵ Their lordships could not discover any factual basis leading to a conclusion that any industrial emergency in Canada had brought about the federal legislation.⁷⁶

Yet, the Canadian parliament's power to enact in war-time the broadest social and economic controls has been confirmed and illustrated in a trilogy of cases involving either the temporary continuation as a transitional measure after war's end of controls enacted during a war, or the institution of fresh measures after war's end to deal with a war-created problem. In *Fort Frances Pulp & Power Co. v. Manitoba Free Press Co.*,⁷⁷ the Privy Council upheld federal price control measures that had been applied to paper during World War I and temporarily continued after war's end. The Privy Council ex-

⁶⁵ *Supra* note 63.

⁶⁶ (1882), 7 App. Cas. 829, 2 Cart. B.N.A. 12 (P.C.).

⁶⁷ *Toronto Electric Comm'rs. v. Snider*, [1925] A.C. 396 at 412, [1925] 2 D.L.R. 5 at 16.

⁶⁸ See *The King v. Eastern Terminal Elevator Co.*, [1925] S.C.R. 434 at 438, [1925] 3 D.L.R. 1 at 6 per Anglin C.J.

⁶⁹ See Marx, *supra* note 2, at 57n. 96.

⁷⁰ See *A.G. Ont. v. Can. Temperance Fed'n.*, *supra* note 15 at 205 (A.C.), 5 D.L.R.

⁷¹ *Supra* note 63.

⁷² *Id.* at 197 (A.C.), 516 (D.L.R.), 24 (W.W.R.).

⁷³ *Id.*

⁷⁴ *Supra* note 67.

⁷⁵ 6 & 7 Edw. 7, c. 20 (Can.).

⁷⁶ *Supra* note 67, at 414-16 (A.C.), 17-19 (D.L.R.).

⁷⁷ *Supra* note 39.

PLICITLY recognized that, in a great emergency such as war, the normal distribution of powers in sections 91 and 92 of the *B.N.A. Act* is altered to allow the national government to deal effectively with the emergency on a national basis.⁷⁸ In addition, the effects of that war or emergency may continue for some time afterwards so that the national parliament and government is permitted temporarily to continue war-time measures for the purpose of ensuring an orderly return to peaceful conditions.⁷⁹ In *Co-Operative Committee on Japanese-Canadians v. A.G. Can.*,⁸⁰ the Privy Council upheld as valid, under the emergency power in section 91, deportation orders made against certain persons of Japanese descent *after* the end of World War II. Their lordships emphasized that, once parliament and the executive have determined the existence of an emergency, the courts will be loathe to question whatever measures the parliament deems necessary to cope with the crisis *unless* the emergency has, as a matter of fact, either not arisen or ceased to exist. Even in these cases, "very clear evidence" would be required before a court would be justified in holding that the situation no longer warranted the national parliament's emergency prescription.⁸¹ Likewise, the Supreme Court of Canada, following the *Fort Frances* and *Japanese-Canadians* decisions, upheld under the emergency power in section 91 the temporary continuation after the Second World War of federal restrictions on rentals for leasehold properties, even though such matters usually fall within provincial jurisdiction.⁸²

Thus, it is abundantly clear that the power of the Canadian parliament to enact, in war-time, the most thoroughgoing regime of economic and social controls otherwise only permitted to the provinces is virtually limited only by the duration and extent of the military emergency. In all events, Canadian courts are constrained to accept the parliament's, or the executive's determination of the length and gravity of the situation unless very compelling evidence of the absence or termination of any true crisis is forthcoming. Certainly, during both world wars, and particularly the second one, Canadian governments, exercising the almost limitless powers under the federal *War Measures Act*,⁸³ controlled huge areas of the national economic, industrial and social life virtually without constitutional question.

V. WAR'S AFTERMATH AS AN EMERGENCY

The Canadian cases examined in the previous section of this paper provide the answer to the question: Does the emergency power in Canada, given its elastic nature, fade rapidly away when war or associated emergency is over? The decisions in *Fort Frances*, *Japanese-Canadians*, and *Wartime Leasehold Regulations* clearly demonstrate that in Canada the power of parliament to deal with the military emergency does not evaporate the

⁷⁸ *Id.* at 703-705 (A.C.), 633-34 (D.L.R.).

⁷⁹ *Id.* at 706-708 (A.C.), 634-37 (D.L.R.).

⁸⁰ *Supra* note 39.

⁸¹ *Id.* at 101 (A.C.), 585 (D.L.R.).

⁸² *Supra* note 39.

⁸³ R.S.C. 1970, c. W-2.

moment the war ends. The concept of "emergency" legislation under the general power of section 91 of the *B.N.A. Act* does include a power to nurse the country through the transition from war to peace. This "convalescence" may require that a selection of the war-time measures be continued in force temporarily to assist an orderly transition to peace-time conditions. Since the three cases just cited illustrate this fully, the situation in Canada needs no further comment.

In Australia, the courts have likewise held that the power in section 51(vi) of the Australian constitution embraces the ability to continue for a time, beyond the close of hostilities, such war-time measures as may aid an orderly passage from war to peace. In the years immediately following the end of hostilities in World War II, a number of Australian Commonwealth post-war economic controls were attacked as being *ultra vires* section 51(vi) of the Australian constitution. For example, in *Dawson v. The Commonwealth*,⁸⁴ transitional measures continuing a requirement of federal Treasury consent for land sales (normally within state jurisdiction) were attacked as being no longer supportable under the defence power. The controls were upheld. In *Miller v. The Commonwealth*,⁸⁵ the attack was levelled at federal transitional measures maintaining the war-time federal controls on the sale of corporate securities. Again, the controls were upheld. A number of other examples could be given, but in general, the early post-Second World War High Court decisions established, first, that the federal defence power did not immediately decline to its normal peace-time level merely because the shooting war had stopped; and, second, that the defence power enabled the Commonwealth to continue temporarily selected war-time control measures in the interests of orderly transition.⁸⁶

The High Court, however, was not willing to accord the federal parliament the same level of *carte blanche* in determining the appropriate duration of transitional controls, as apparently the Canadian courts accorded the Canadian parliament. The High Court warned that it would often be a matter of degree as to when a federal transitional measure was legitimately incidental to "winding down" the nation's war effort, or whether the measure was merely one of general economic control, no longer particularly related to the then recent war emergency, and thus *ultra vires*.⁸⁷ The High Court was clearly worried that, by allowing the Commonwealth too much latitude in unilaterally deciding on the duration of "temporary" transitional economic controls, the federal parliament was being given, in the shape of section 51(vi), a "back door" method of upsetting the whole constitutional division of legislative powers between Commonwealth and states.⁸⁸

⁸⁴ (1946), 73 C.L.R. 157, [1946] A.L.R. 461, 20 A.L.J. 257 (H.C. of Aust.).

⁸⁵ (1946), 73 C.L.R. 187, [1946] A.L.R. 469, 20 A.L.J. 253 (H.C. of Aust.).

⁸⁶ For a useful survey of early post-World War II Australian federal "transitional" legislation, and of the Australian High Court's initial treatment of the "transitional" aspect of the defence power, see Else-Mitchell, *Transitional and Post-War Powers in the Commonwealth of Australia* (1947), 25 Can. B. Rev. 854.

⁸⁷ E.g., *Australian Textiles Pty. Ltd. v. Cth.* (1945), 71 C.L.R. 161 at 170 (H.C. of Aust.).

⁸⁸ E.g., *R. v. Foster* (1949), 79 C.L.R. 43 at 83 (H.C. of Aust.).

The crunch came in 1949, four years after the end of the "hot" war, when the High Court overturned three pieces of Commonwealth economic control that had been maintained on an annual "temporary" basis since the end of the war in the interests of orderly transition to peace. In the case of *R. v. Foster*,⁸⁹ the High Court decided that continuance of war-time regulations concerning women's employment, fuel rationing and certain types of housing control (areas not normally within the Commonwealth's enumerated jurisdictions) was no longer justifiable under the "transitional" aspect of section 51(vi). The argument in favour of the measures' continued validity under the "transitional" defence power was that the controls related to economic problems that had been greatly exacerbated during the war, and that those problems were still continuing. In rejecting this line of argument, the Court said it was insufficient, for the purposes of justifiability under section 51(vi), that war-aggravated or war-caused economic problems had, by the time of the litigation in question, become part of the general pattern of Australian economic life. In the words of the Court:

The effects of the past war will continue for centuries. The war has produced or contributed to changes in nearly every circumstance which affects the lives of civilized people. If it were held that the defence power would justify any legislation at any time which dealt with any matter the character of which had been changed by the war, or with any problem which had been created or aggravated by the war, then the result would be that the Commonwealth Parliament would have a general power of making laws for the peace, order and good government of Australia with respect to almost every subject.⁹⁰

It can thus be seen that, in relation to the "transitional" aspect of the Australian defence power, the High Court was prepared to recognize that the basic question was ultimately one of constitutional policy for the court to decide, rather than one for the parliament. When does a post-war control measure, not otherwise within federal competence, cease to be properly incidental to a legitimate defence-transitional stage? This becomes an indefinite enquiry, in which factors of policy and administrative convenience compete with legal rules that are, at best, fuzzy and conjectural. It is little wonder that one commentator has described *R. v. Foster* as a pleasing *administrative* step by the High Court to "unwind" the defence power of the Commonwealth after World War II.⁹¹

Before leaving the field of war's aftermath and Australian and Canadian federal powers to deal with its effects, some comments are in order as to another area of activity that has engaged both federal polities in post-war times: the passage of legislation facilitating the re-entry into civilian life of former members of the fighting services. After both the First and Second

⁸⁹ *Id.* *R. v. Foster* is actually a consolidation of three cases decided by the Australian High Court simultaneously: *R. v. Foster* itself; *Wagner v. Gall*; and *Collins v. Hunter*. The Court delivered a single, unanimous judgment covering all three cases.

⁹⁰ *Supra* note 88.

⁹¹ Sawyer, *The Transitional Defence Power of the Commonwealth* (1949), 23 Aust. L.J. 255 at 255. For two other examples of High Court invalidation of post-World War II Australian federal control measures, see: *Queensland Newspapers Pty. Ltd. v. McTavish* (1957), 85 C.L.R. 30, [1951] A.L.R. 821, 25 A.L.J. 491 and *Aberdare Collieries Pty. Ltd. v. Cth.* (1952), 86 C.L.R. 12, [1952] A.L.R. 249, 26 A.L.J. 64.

World Wars, federal parliaments in both Australia and Canada enacted various laws providing benefits in one form or another to assist ex-servicemen to re-establish themselves in civilian life. Sometimes the assistance took the form of direct financial or material aid of many types; sometimes the assistance took the form of laws granting preference in employment to ex-servicemen. Generally, the laws applied only to the enacting parliament's own agencies and civil service, though the ambit of some extended to all civilian employers.

In both countries, such legislation is regarded as being appropriately within federal jurisdiction: in Australia, under section 51(vi) of the Australian constitution; in Canada, under either section 91(7) of the *B.N.A. Act*, or the general power in its emergency aspect, in the preamble of section 91. There has been little consideration of the constitutionality of "re-establishment" legislation by the Canadian courts; the one or two lower courts that have made passing reference to the matter seem to doubt that section 91(7) is the appropriate constitutional basis for such laws. Rather, they seem to regard the re-absorption into civilian life of large numbers of ex-soldiers as an aftermath of war that is appropriately dealt with under the emergency power in section 91.⁹²

In Australia, however, while the High Court has affirmed that section 51(vi) of the Australian constitution provides the foundation for federal "re-establishment" legislation, the Court has drawn a limit of some importance. The Court has recognized that the Commonwealth, in pursuance of its jurisdiction under section 51(vi), may expend its own treasure and resources on the advancement of direct benefits to ex-servicemen without any limits as to duration;⁹³ however, the matter is different when the Commonwealth attempts to alter, under colour of section 51(vi)-type legislation, the normal rights and liabilities as between ex-servicemen and other members of the general public. This may be done for a temporary period after war's end with a view to re-settling large numbers of soldiers who have recently been demobilized,⁹⁴ but once the country and population have been largely returned to normal peace-time conditions, such federal laws lose any justification under section 51(vi). The analogy with *R. v. Foster*⁹⁵ becomes readily apparent. Accordingly, in *Illawarra District County Council v. Wickham*,⁹⁶ the High Court struck down, as being far too remote from post-Second World War transitional conditions, federal legislation that attempted to extend to 1960 a 1945 Commonwealth provision giving Second World War ex-servicemen and their dependants certain preferential employment rights

⁹² See *Re Soldier Settlement Act and McManus*, [1939] 2 W.W.R. 199 (D.C. Sask.). In *Fry v. W. H. Schwartz & Sons Ltd.*, [1951] 2 D.L.R. 198 (N.S.S.C.), the Court considered that the Canadian *Reinstatement in Civil Employment Act 1946* was valid as "a defence measure"—the Court declined to say whether that validity rested on s. 91(7) or the federal general power.

⁹³ E.g., *A.G. Cth. v. Balding* (1920), 27 C.L.R. 395, 26 A.L.R. 85 (H.C. of Aust.).

⁹⁴ See *Wenn v. A.G. Vict.* (1948), 77 C.L.R. 84 at 111 (H.C. of Aust.).

⁹⁵ *Supra* note 88.

⁹⁶ (1958-59), 101 C.L.R. 467 (H.C. of Aust.).

vis-à-vis the rest of the general public. In the words of Windeyer J., section 51(vi) does not allow the Commonwealth to create ex-servicemen "a privileged class among civilians."⁹⁷

It can be seen, therefore, that in both Canada and Australia the defence and emergency powers conferred upon the respective federal parliaments enable the latter to invade substantially areas otherwise reserved to the provinces and states, on the basis of regulating an orderly transition from war conditions to peace-time. The one major difference between the two jurisdictions has been that, in Australia, the High Court has been prepared to be far more assertive in telling the Commonwealth, in effect: "We, the court, judge that you, the Commonwealth, have had long enough to restore the country to peace-time conditions. You can no longer trespass upon state jurisdictions by claiming the existence of 'transitional' conditions. We are the ultimate constitutional arbiters, and we say — 'enough'." This is perhaps a very free translation of decisions like *R. v. Foster*, but the contrast with the Supreme Court of Canada's "we largely bow to parliamentary judgment in these matters" attitude is nevertheless very marked.

VI. IS MERE APPREHENSION OF WAR A SUFFICIENT EMERGENCY?

Though the constitutions (and the courts) of the federations have vested a very wide power in the federal parliaments to trespass upon provincial and state preserves, in the interests of war-time mobilization of national effort and steering the nation through the difficult transitional waters from war to peace, there remains another situation to be considered. If the federal government perceives (rightly or wrongly) that the country may be soon involved in international conflict and war, must it wait until the military crisis breaks out in its full rigour before it can avail itself of the extraordinary emergency and defence powers in the constitution to order the nation's affairs accordingly? Can it use those powers to prepare the nation's resources, economic and material, as well as military, *in advance* of the coming struggle?

In both countries, there is a measure of latitude in the federal parliament's power to use defence and emergency powers in situations short of outright war, but in which trouble seems to be brewing. The actual ability to use the power during such times seems to be established. The question is: how far, in pre-war situations, can the respective federal parliaments go, in overriding the normal division of powers between central and regional legislatures?

A survey of Canadian constitutional law reveals no cases decided specifically on the topic. If one reasons by analogy with the judicial decisions on the scope of the federal general power in situations of war, aftermath of war, and "peace-time" emergencies, there seems little reason to doubt that

⁹⁷ *Id.* at 503. His Honour could hardly be accused of lacking sympathy for ex-servicemen; he had served with the Australian Army in World War II, as a battalion and brigade commander, with distinction.

the Canadian parliament in all probability possesses a sizable power, even in areas of usual provincial jurisdiction, to arrange the affairs of the country in preparation for war if the national government is *bona fide* of opinion that war is threatening. The Privy Council has upheld price controls⁹⁸ and deportation orders⁹⁹ in the immediate aftermath of war, relying on the federal general power in section 91 of the *B.N.A. Act*; the Supreme Court of Canada has upheld under the same power federal leasehold regulations in the not-quite-so-immediate aftermath of war;¹⁰⁰ and the latter has quite recently upheld federal wage and price controls (usually very much in the provincial domain pursuant to section 91(13) of the *B.N.A. Act*) in a time of reasonably profound world peace, under the general power in section 91, on the strength of the federal parliament's assertion that there was an economic difficulty (inflation) causing serious concern to the nation.¹⁰¹ It is hard to imagine that the Supreme Court would question the Canadian parliament if, because of a grave international atmosphere and threat of conflict, that parliament was going to take preparatory measures, such as moves to mobilize the national economy for potentially increased war production. It is suggested that the proclamation of the Canadian *War Measures Act*¹⁰² during such a period would probably not be successfully challenged for want of constitutionality in the Supreme Court of Canada.¹⁰³ The invocation of the *War Measures Act* by the Canadian government in the "October Crisis" of 1970, in a time not of war but apprehended internal revolt,¹⁰⁴ and without serious constitutional challenge,¹⁰⁵ lends some support to this view.

In Australia, the federal parliament's power to invoke measures not normally sanctioned under section 51 of the Australian constitution, on the basis of imminent rather than actual war, has been considered twice by the High Court. In *Australian Communist Party v. The Commonwealth*,¹⁰⁶ and *Marcus Clark & Co. Ltd. v. The Commonwealth*¹⁰⁷ the Court had to rule upon federal laws, normally incompetent to the Commonwealth under section 51, that had been enacted during a period of grave international crisis (in this instance, the Korean War, 1950-53) to help prepare the country for possible war. In

⁹⁸ The *Fort Frances* case, *supra* note 39.

⁹⁹ The *Japanese-Canadians* case, *supra* note 39.

¹⁰⁰ The *War-time Leasehold Regulations* reference, *supra* note 39.

¹⁰¹ *Anti-Inflation Reference*, *supra* note 16.

¹⁰² R.S.C. 1970, c. W-2.

¹⁰³ In the *Anti-Inflation Reference*, *supra* note 16, Beetz J. was explicitly prepared to assume that the Canadian parliament might exercise its national emergency powers in anticipation of an actual emergency: see *op. cit.* at 459 (S.C.R.), 525 (D.L.R.), 619 (N.R.).

¹⁰⁴ For an account of the "October Crisis", and the Canadian government's response thereto, see Tarnopolsky, *The Canadian Bill of Rights* (2d rev. ed. Toronto: McClelland & Stewart, 1975) at 331-51.

¹⁰⁵ A constitutional objection to the Act's invocation was, amongst a number of other objections, rather brusquely rejected by the Quebec Court of Appeal in *Gagnon & Vallières v. Reg.* (1971), 14 C.R.N.S. 321.

¹⁰⁶ *Supra* note 22.

¹⁰⁷ (1952), 87 C.L.R. 177 (H.C. of Aust.).

both cases, the basic issue was the same: Would section 51(vi) of the Australian constitution, in its secondary (non-military) aspect, support federal measures in a time short of outright war that would normally transgress the federal-state division of powers, but were deemed necessary for national security?

In the *Communist Party* case, a federal statute,¹⁰⁸ after reciting certain allegedly subversive and treasonable aims, doctrines and activities of the Australian Communist Party, simply dissolved the party. The Act also provided that associations controlled by communists could be dissolved by executive fiat if those associations were declared by the Governor-General to be unlawful and a threat to national security. Also, certain civil disabilities were imposed upon individual communists. It must be borne in mind that the Act was passed several months after the outbreak of the Korean War, in which Australian forces were participating as part of the United Nations force.

The trouble with the Act was that although the Commonwealth had full powers to prohibit the alleged activities of the party, that is not what the Act did: it simply dissolved the party. On its face, it was a law with respect to unincorporated associations (over which the Commonwealth has no control under section 51), not a law with respect to treason and subversion. The only link between the Act and the defence power was the Act's recitals evidencing the federal parliament's opinion of the treasonable activities of the party. The High Court, with only one dissent, struck down the Act. No one doubted that the secondary aspect of section 51(vi) might operate in a time of highly disturbed world unrest,¹⁰⁹ but this was not such an occasion. The Court accepted that in a time of *outright* war the Act would be valid under, *inter alia*, section 51(vi), but not in a time short of that.¹¹⁰ If the facts alleged against the party had been objectively provable, so that the courts could see the connection between the operation of the Act and section 51(vi), then the Act might have been valid; but for parliament merely to recite in the Act that the Communist Party was guilty of treasonable activities was to allow parliament to usurp the constitutional function of the courts in finding links between federal laws and heads of constitutional power on which to base them. To allow probative force to the Act's recitals would be to say that "Parliament could recite itself into a field which was closed to it."¹¹¹ Apart from adducing actual proof of the Act's allegations against the party, which all but two of the Court refused to contemplate, the only other way of establishing the facts necessary for the Act's validity was by way of the device of judicial notice. None of the majority was prepared to judicially notice any notorious treasonable activity by the party, as distinct from its mere propagation of unpopular doctrines.

Three things probably spelt the constitutional doom of the Act: first, the

¹⁰⁸ *Communist Party Dissolution Act 1950* (No. 16 of 1950, Aust.).

¹⁰⁹ *E.g.*, *Communist Party* case, *supra* note 22 at 195, 254.

¹¹⁰ *Id.* at 197-98, 258-59, 266.

¹¹¹ *Id.* at 264.

fact that Australia was clearly not involved in general war;¹¹² second, the fact that the federal parliament tried to arrogate to itself the function of judging the constitutional validity of the Act, by way of the recitals;¹¹³ and third, the qualms felt by at least some of the majority at this federal invasion of civil liberty at a time when Australia was not embroiled in a general "hot" war, as distinct from a purely limited conflict.¹¹⁴

Some months later, another chance arose, in the *Capital Issues* case,¹¹⁵ to explore the ambit of the Australian defence power's "secondary aspect" in a time short of general war. In 1951, the Australian Commonwealth parliament passed the *Defence Preparations Act*¹¹⁶ which, *inter alia*, authorized regulations prohibiting corporations from raising capital without the federal Treasurer's consent, which could be denied only on the ground that such raising of capital was inimical to the country's defence preparations. The Act included a number of recitals detailing the tense international situation (the Chinese had by then intervened in Korea and there was a widespread belief that a general war between the Western powers and the Soviet Bloc was imminent) and the need to implement certain economic mobilization measures in Australia to prepare the economy for possible war. The regulations included a provision that, if the Treasurer denied his permission, he could be compelled to give his reasons in writing, and these were made admissible in court. Marcus Clark & Co. wished to finance expansion of their business with a share issue. They applied for federal permission, were refused, secured the Treasurer's reasons in writing, then sued the Commonwealth, alleging invalidity of the Act and regulations. The only head of Commonwealth power that the defendants relied on was section 51(vi). With two dissents, the High Court upheld the Act and regulations.

The majority were impressed by three major factors: first, the extent of the world international crisis;¹¹⁷ second, the fact that, in modern twentieth century warfare, it was standard practice for belligerent nations to impose strong monetary and capital controls in their war economies;¹¹⁸ and third, the reasons for refusal by the Treasurer were clearly related in their detail to the imminent war emergency and, equally important, were fully available for scrutiny.¹¹⁹ This, then, enabled the Court to evaluate objectively the alleged link between the impugned federal measure (the Treasurer's refusal) and a head of constitutional power, in this case section 51(vi). This third factor, the court's ability to scrutinize the reasons for the Commonwealth's

¹¹² *E.g., id.* at 192, 196.

¹¹³ *E.g., supra* note 111.

¹¹⁴ *E.g., supra* note 22, at 193-94.

¹¹⁵ *Supra* note 107.

¹¹⁶ (No. 20 of 1951, Aust.).

¹¹⁷ *E.g., supra* note 115, at 219-20, 248.

¹¹⁸ This factor was of great importance particularly to Dixon C.J.: see *id.* at 216-19.

¹¹⁹ *E.g., id.* at 256-57.

allegedly unconstitutional activity, was the great distinguishing factor, in the eyes of the majority, between *Capital Issues* and *Communist Party*.¹²⁰

From these two decisions, it is reasonably clear that the Australian defence power's "secondary aspect" will indeed sanction, in time of grave international unrest short of war, some preparatory federal measures that normally lie within state jurisdictions. Just how far section 51(vi) may be extended is debatable since so much will depend on the court's opinion of the gravity of the potential crisis.¹²¹ Although one commentator on the *Communist Party* and *Capital Issues* decisions somewhat facetiously suggested that the two cases merely demonstrated that raising money is less important than liberty of opinion,¹²² this is, it is suggested, a fairly good criterion on which to work. If the secondary aspect of the Australian defence power is to operate not merely in times of outright war, why not state that its application to restrict liberty of opinion (normally a matter largely reserved to the Australian states) should *only* be in times of general war? Why not state that the power's operation, in times of military danger short of war, should encompass only necessary preparatory legislation of an economic and material kind? The latter limitation is not without its own problems; for example, should an imminent world crisis enable the federal authorities to assume control of mineral or other natural resources situated within a state, if that resource happens to possess strategic propensities? Like Canada, the ownership and management of natural resources located within Australian state boundaries are reserved to the states. Unlike Canada, the Australian parliament possesses no equivalent of the declaratory power of the Canadian parliament in section 92(10)(c) of the *B.N.A. Act*.¹²³ The answer would almost certainly depend on the High Court's judgment of the seriousness of the impending military crisis alleged by the Commonwealth, and that raises a very fundamental question: whether a court is properly equipped, or is indeed the appropriate forum, for deciding such potentially delicate questions of high policy.¹²⁴

VII. EMERGENCIES IN PEACE-TIME

The categories of emergencies, like those of negligence, are never closed. In times of unsettled economies and unsettled social structures and values, it is

¹²⁰ *E.g., id.* at 215-16, 252-53.

¹²¹ See Anderson, *Australian Communist Party v. The Commonwealth* (1948-51), 1 U. of Queensland L.J. (No. 3) 34, at 43.

¹²² Sawyer, *supra* note 29, at 223.

¹²³ The constitutional ability of the Canadian parliament to assume responsibility for regulating the Canadian uranium industry probably rests, in part, on declaratory power, as well as on the federal general power in its "national dimensions" aspect: see the *Atomic Energy Control Act*, R.S.C. 1970, c. A-9, s. 18; and *Pronto Uranium Mines v. O.L.R.B.*, [1956] O.R. 862 at 867-70, 5 D.L.R. (2d) 342 at 347-49, 56 C.L.L.C. ¶15,293.

¹²⁴ The dissent of Latham C.J. in the *Communist Party* case, *supra* note 22, is based, in part, on the understandable proposition that a court is exceedingly ill-equipped to assess the often secret and sensitive information on which governments will often base their emergency decisions relating to national defence: see *supra* note 22, at 142-45.

a naive government or parliament that thinks that the only emergencies it will have to confront are military ones. This penultimate section of the paper thus deals with the constitutional capacity of the Australian and Canadian federal parliaments to cope with what might be loosely termed "peace-time" emergencies that have no necessary relationship to an existing state of war or military crisis.

There can be little doubt that, of the two federations, Canada is better equipped constitutionally for the federal handling of peace-time emergencies. This is because the Australian constitution does not contain a federal general power analogous to that in the preamble to section 91 of the *B.N.A. Act*.

Although there may be fierce debate in Canada as to whether the general power should be restricted to matters of national emergency, or should embrace matters normally of provincial concern which have attained a "national dimension," it is now clearly established that the power embraces non-war emergencies. Prior to the decision in the *Anti-Inflation Reference*,¹²⁵ the "emergency" aspect of the general power had only ever been successfully invoked in war-related cases, but the Canadian courts and the Privy Council had never categorically limited "emergency" under section 91 to war-related emergencies. Even at high-water periods of the Privy Council's pro-provincial, anti-federal decision-making, their lordships never precluded the possibility that "emergency" under section 91 might embrace non-war related crises in the national life.¹²⁶ Thus, validity of the federal legislation in *Toronto Electric Commissioners v. Snider*¹²⁷ was denied because, *inter alia*, the legislation was not temporary and exhibited no signs of being passed to meet a crisis situation.¹²⁸ Likewise, in the *Unemployment Insurance reference*¹²⁹ of 1937, the Privy Council rejected the federal unemployment insurance scheme at least partially because (a) they probably did not consider the financial difficulties of Canada during the Great Depression to be sufficiently an emergency,¹³⁰ but also because (b) the legislation again exhibited none of those "temporary palliative" tendencies that the Board thought should characterize true emergency laws.¹³¹

The Supreme Court decision in the *Anti-Inflation Reference*, however, has opened up possibilities of federal intervention in all sorts of non-military aspects of the national life, notwithstanding section 92 of the *B.N.A. Act*, under the colour of "emergency". The *Anti-Inflation Reference* itself was a dramatic enough example of federal action in previously constitutionally-

¹²⁵ *Supra* note 16.

¹²⁶ *E.g.*, *Toronto Electric Comm'rs v. Snider*, *supra* note 67, at 412 (A.C.), 15 (D.L.R.).

¹²⁷ *Id.*

¹²⁸ *Id.* at 414-16 (A.C.), 17-18 (D.L.R.).

¹²⁹ *A.G. Can. v. A.G. Ont.*, [1937] A.C. 355, [1937] 1 D.L.R. 684, [1937] 1 W.W.R. 312.

¹³⁰ *Id.* at 365-66 (A.C.), 686 (D.L.R.), 315 (W.W.R.).

¹³¹ *Id.*

doubtful fields—wide-ranging wage and price controls in broad areas of federal and provincial concern—but the potential for federally-declared emergencies having no relation to an existing war must be now greatly expanded. In 1974, for example, the Canadian parliament enacted the *Energy Supplies Emergency Act*.¹³² This statute, which was in force only till 1976, was designed to meet the possibilities of drastic oil shortages following OPEC boycotts and production cutbacks consequent upon the Yom Kippur War of 1973. This Act basically allowed the Governor-General in Council to declare an emergency in the oil-supply situation in Canada, and consequently, to institute the most thorough controls of oil distribution, including rationing and the mandatory supply of set quotas to various regions of the country. Such a scheme clearly envisaged the regulation of petroleum supplies right down to the most provincial and local of levels. There may have been some doubt whether such a scheme would have been constitutionally sustainable under, *inter alia*, section 91(2) of the *B.N.A. Act*—"the regulation of trade and commerce"¹³³—but the Act clearly drew upon the concept of an oil-supply "emergency," and thus relied on the emergency aspect of the federal general power.¹³⁴

The constitutional success of the federal parliament's (albeit temporary) wage and price controls in the *Anti-Inflation Reference* has probably given the federal government of Canada new heart that it may equally successfully control other aspects of the national life under the emergency doctrine. This is evinced by the federal enactment of a permanent *Energy Supplies Emergency Act* in 1979.¹³⁵ None of the foregoing is to suggest that the Canadian government and parliament would *mala fides* set out to grab large slices of provincial social and economic jurisdiction under cover of a "colourable" emergency. Some of the matters previously discussed may well be appropriate subjects for federal action. Yet the great latitude allowed by the Supreme Court to the federal parliament in asserting an emergency's existence must cause some concern to ardent provincialists.¹³⁶

The Australian position would undoubtedly be lauded by provincialists: the absence of a general power in section 51 of the Australian constitution largely denies the Australian federal parliament the power to take national "emergency" action in times of peace-time crisis unless, of course, the crisis occurs in an area of Commonwealth responsibility under the constitution. Australia too has had its constitutional dalliance with federal wage and price controls, which, as in Canada, are normally beyond federal competence. In 1973, when inflation was causing the Australian federal government grave concern, it wanted to implement federal wage and price controls. Since there was no general power in section 51 to which the Australian government could

¹³² S.C. 1973-74, c. 52 as am.

¹³³ See Marx, *The Energy Crisis and the Emergency Power in Canada* (1975), 2 Dal. L.J. 446 at 447-48.

¹³⁴ *Id.* at 448-50.

¹³⁵ S.C. 1978-79, c. 17.

¹³⁶ See, e.g., Patenaude, *The Anti-Inflation Case: The shutters are closed but the back door is wide open* (1977), 15 Osgoode Hall L.J. 397.

resort, it had to try to amend the constitution,¹³⁷ by national referendum, to add wages and prices to the list of federal powers in section 51. The referendum failed; wage and price controls stayed beyond the grasp of the federals. Section 51(vi) is, of course, useless in this kind of situation. As has been shown, that provision permits the Commonwealth almost complete economic control in times of war-related emergency, but it is of no avail in peace-time. An Australian federal equivalent of the Canadian *Energy Supplies Emergency Act* would definitely be constitutionally vulnerable.¹³⁸ The Act might be partially sustainable under the Commonwealth's power over interstate and overseas trade and commerce,¹³⁹ but only partially, because of the extensive regulation of *intrastate* trade and commerce that would be involved. The highly strategic nature of oil in both war and peace suggests that a "mix" of the Commonwealth's trade and commerce *and* defence powers might support such a statute in Australia, but the question is very doubtful and would clearly lead, if litigated, to great agonizings in the High Court over the scope of the defence power's "secondary aspect" in time of peace.

The problem is that the High Court has never given any general recognition to the concept that a matter of "national dimension" should, for that reason alone, be allocated to the federal parliament. There is no *implied* federal general power in the Australian constitution except to an extremely limited, and as yet vaguely formulated, extent. The 1975 High Court decision in *Victoria v. The Commonwealth and Hayden*¹⁴⁰ is the most recent, and indeed virtually the only, occasion on which the court has given some attention to the idea of a "national dimensions" doctrine for the Australian constitution. The case concerned an attack upon the validity of a federal *Appropriations Act*¹⁴¹ which sanctioned spending federal monies upon a number of federal social welfare purposes, some of which were *intra vires* the constitution, some of which were not. The challenge failed for reasons not germane to this paper, but several judges took the opportunity to consider the argument that if a problem is of nationwide importance, but does not fall within the Commonwealth list of powers in section 51, then it ought to be a Commonwealth responsibility anyway.

Barwick C.J. and Gibbs J. specifically rejected this argument:¹⁴² "the growth of the Commonwealth to nationhood did not have the effect of destroying the distribution of powers carefully effected by the Constitution."¹⁴³ Barwick C.J., along with Mason and Jacobs JJ., also recognized, however, that certain implied powers *did* inhere to the Commonwealth because of the

¹³⁷ Unlike the *B.N.A. Act*, the Australian constitution can be amended locally by means of a process involving, *inter alia*, a national referendum: see Australian constitution, s. 128.

¹³⁸ At the time of writing (February 1980), there is no equivalent Act on the Australian federal statute books.

¹³⁹ Australian constitution, s. 51(i).

¹⁴⁰ *Supra* note 24.

¹⁴¹ (No. 1 of 1974, Aust.).

¹⁴² *Supra* note 140, at 362, 364, 378 (C.L.R.), 165, 171 (A.L.J.R.).

¹⁴³ *Id.* at 378 (C.L.R.), 171 (A.L.J.R.).

latter's status as a fully sovereign national government; that is, the very status of nationhood did, by itself, attract to the Commonwealth certain powers not mentioned in section 51 or elsewhere.¹⁴⁴ The judges mentioned several examples of such implied powers: the power of the Commonwealth to engage in geographical exploration,¹⁴⁵ scientific research¹⁴⁶ and to conduct national enquiries and surveys for information-gathering purposes.¹⁴⁷ But generally, the judges who considered this matter preferred not to define closely the nature or extent of this implied "national" power; they preferred to await the unfolding of time and changes in conditions and circumstances, so that the further nature of this power might be revealed.¹⁴⁸

These *dicta* are hardly illuminating. They reveal competing desires: a desire not to do radical violence to the constitution's division of powers, but also a wish *not entirely* to preclude the probability, or possibility, that the developing national interest might require the judicial invention of appropriate federal powers for special, as yet unheralded, problems. Might not the future intervention of some great economic crisis of disastrous proportions, or a major natural disaster, call forth judicial approval of a possible Australian federal peace-time emergency power? Only time will tell, but the seeds of such a future possible development may lie in those guarded comments of Barwick C.J., Mason and Jacobs JJ. in *Victoria v. The Commonwealth and Hayden*.

VIII. CONCLUSION: THE JUDICIAL ROLE IN POLICING EMERGENCIES IN AUSTRALIA AND CANADA

In such manner, then, have the Australian and Canadian courts succeeded in fashioning, from their respective constitutional instruments, a highly effective emergency power for use by their respective national governments and parliaments in war-time and war-related emergencies. At the level of *military* crisis, it has been shown that the Australian defence power in section 51(vi) of the constitution has matched, in content and scope, the Canadian war-emergency power constructed out of the Delphic preamble to section 91

¹⁴⁴ There is one other implied "national power" that the Australian High Court has, for many years prior to *Vict. v. Cth. and Hayden*, recognized as belonging to the Commonwealth in virtue of its status as a sovereign, national government: the so-called "internal security power", by which the Commonwealth can legislate to protect its instrumentalities, officers, and property (indeed its own continued existence as a constitutional polity), from internal attack, subversion, or criminal activity. See *R. v. Kidman* (1915), 20 C.L.R. 425, 21 A.L.R. 405 (H.C. of Aust.); *Burns v. Ransley* (1949), 79 C.L.R. 101, [1949] A.L.R. 817, 23 A.L.J. 441 (H.C. of Aust.); and *R. v. Sharkey* (1949), 79 C.L.R. 121 (H.C. of Aust.). However, the Commonwealth cannot intervene in an Australian state that is threatened by internal civil violence unless that state requests federal assistance: see Australian constitution, s. 119; and see also *R. v. Sharkey*, *op. cit.*, at 151. Several Australian states possess their own local "emergency powers"-type legislation: for a bizarre illustration of the Queensland law in action, see *Dean v. A.G. of Qld.*, [1971] Qld. R. 391 (S.C. of Qld.). The federal internal security power was argued by the Commonwealth in the *Communist Party* case, *supra* note 22, but this was rejected by the majority of the Court.

¹⁴⁵ *Supra* note 140, at 362, 413 (C.L.R.), 165, 184 (A.L.J.R.).

¹⁴⁶ *Id.* at 362, 397, 413 (C.L.R.), 165, 178, 184 (A.L.J.R.).

¹⁴⁷ *Id.* at 397, 412 (C.L.R.), 178, 183 (A.L.J.R.).

¹⁴⁸ *Id.* at 397-98 (C.L.R.), 178 (A.L.J.R.).

of the *B.N.A. Act*. Different constitutional texts have resulted in almost identical federal powers in both countries. When departure is made from the field of military emergency, however, the constitutional positions in the two countries have differed: section 91 of the *B.N.A. Act* gives the Canadian parliament a potentially massive power of control of peace-time emergency situations, whereas section 51(vi) of the Australian constitution is most unlikely to give the Commonwealth a power to intervene in non-war-related national crises.

The major problem for the judiciary in both countries has been that the concept of emergency involves a temporary shift in the constitutional division of powers, with the federal authority taking over many significant areas of provincial or state authority. The Canadian and Australian judiciary are the ultimate arbiters of that constitutional allocation of powers; therefore, they must police that division of responsibility, and yet not present insuperable obstacles to *bona fide* federal action intended to cope with some species of extreme threat to the national body politic.¹⁴⁹ How have the courts trodden that delicate and difficult line? As a general statement, it may be said that the Canadian courts have, rightly or wrongly, adopted something less of the "constitutional policeman" role in emergency times, than have the Australian courts.

It has been said, both in relation to Australia and Canada, that in constitutional litigation there is a *prima facie* presumption in favour of the validity of impugned federal legislation, particularly emergency legislation.¹⁵⁰ Thus, two separate issues have arisen: first, how conclusive is the parliament's assertion of the *existence* of an emergency, in the eyes of the courts; and second, do the courts question the *efficacy* of measures adopted by parliament to combat the emergency?

It is going too far to uphold the view, as Mr. Justice Brossard once did in the Quebec Court of Appeal, that a court would be without power to question the *factual basis* of a proclaimed state of emergency.¹⁵¹ Brossard J.A. was dealing with the now-famous proclamation of a state of emergency under the Canadian *War Measures Act* during the "October crisis" in Quebec, in 1970. The higher appellate courts of Canada have, on the contrary, stated that a court may indeed question the alleged foundation of a state of emergency, whether under the *War Measures Act* or some other competent statute, but that the evidence warranting a denial of emergency must be very clear

¹⁴⁹ *R. v. Foster*, *supra* note 88, at 83.

¹⁵⁰ In Canada, this statement—after cases such as *Fort Frances, Japanese-Canadians, Wartime Leasehold Regulations*, and *Anti-Inflation*—is almost certainly true: see Laskin, "Peace, Order and Good Government" *Re-Examined* (1947), 25 Can. B. Rev. 1054, at 1082-83; and Belobaba, *Disputed "Emergencies" and the Scope of Judicial Review* (1977), 15 Osgoode Hall L.J. 406 at 414-15. However, the statement in relation to Australia, although often made—see Wynes, *supra* note 21, at 35 and the cases cited therein—is not entirely accurate, since judicial *dicta* in the Australian High Court can be cited in support of a contrary position: e.g., the *Communist Party* case, *supra* note 22, at 255, 263, 275-76; and the *Capital Issues* case, *supra* note 107, at 247.

¹⁵¹ *Gagnon and Vallières v. Reg.*, *supra* note 105, at 348.

and compelling.¹⁵² Where, of course, the "emergency" is constituted by a great war whose existence is a matter of public notoriety and judicial notice, the question of clear and compelling rebuttal evidence would be merely academic.

As has been shown, both the Australian and Canadian courts have largely (and rightly, it may be said) acquiesced in their respective federal parliaments' claiming and asserting sweeping powers on the outbreak of major war. When the question has been the extent of the federal parliament's transitional powers at war's end, however, the High Court of Australia, while recognizing the federal parliament's interest in securing an orderly transition to peace, has been prepared to reject federal attempts to continue temporarily war-time controls.¹⁵³ On the other hand, the Canadian Supreme Court, while recognizing its theoretical right to not accept the federal government's judgment of the situation, nevertheless has not questioned the Canadian government's considered judgment that transitional conditions required the continuation of war-time controls.¹⁵⁴

Likewise, in the sphere of federal governmental assertion of emergency in the *absence* of general war conditions, a change of approach has been noticed as between the Canadian Supreme Court and the Australian High Court. In the *Anti-Inflation Reference*, where the Canadian parliament asserted the existence of an inflationary situation of "serious national concern," the case seems to have been conducted on the basis that "absence of emergency" had to be proved by those attacking the law. Whether the basis of proof be the "no rational basis" of Laskin C.J.C., Judson, Spence, and Dickson JJ.,¹⁵⁵ or the "very clear evidence" basis of Ritchie, Martland, and Pigeon JJ.,¹⁵⁶ a presumption of constitutionality seemed to operate in favour of the Crown—and this in a case where the very existence of the emergency was quite strongly disputed.¹⁵⁷ However, in Australia, in the two major cases concerning

¹⁵² This mis-interpretation of the Canadian cases by Mr. Justice Brossard is succinctly corrected by Marx, *The "Apprehended Insurrection" of October 1970 and the Judicial Function* (1972), 7 U.B.C. L. Rev. 55 at 56-59. It is possible that Brossard J.A. was influenced unduly by the language of s. 2 of the *War Measures Act*, which states that a proclamation by the Governor in Council shall be "conclusive evidence" that there is in existence a state of war, invasion, or insurrection, real or apprehended. Of course, the language of s. 2 cannot prevail against the authoritative pronouncements of the Supreme Court that, constitutionally, a litigant opposing the government use of emergency powers has the option (albeit an extraordinarily difficult one) of attempting to disprove the existence *in fact* of the emergency. See Marx, *op. cit.*, and the cases cited therein.

¹⁵³ E.g., *R. v. Foster*, *supra* note 88.

¹⁵⁴ The *Wartime Leasehold Regulations reference*, *supra* note 39. Of course, the difference between the Australian approach in *R. v. Foster* and the Canadian approach in *Wartime Leasehold* bespeaks more than a simple difference in the two courts' respective approaches to very similar facts; the Australian approach virtually places the onus of proving validity on the federal government, which is practically the reverse of the Canadian approach in *Wartime Leasehold*: also see Marx, *supra* note 2, at 63.

¹⁵⁵ *Anti-Inflation Reference*, *supra* note 16, at 423, 425 (S.C.R.), 496, 497-98 (D.L.R.) 587, 589 (N.R.).

¹⁵⁶ *Id.* at 439 (S.C.R.), 509 (D.L.R.), 601 (N.R.).

¹⁵⁷ A feature that at least one observer regarded as unprecedented and thus doubtful: See Belobaba, *supra* note 150, at 414-15.

federal legislation preparing the country for possible war emergencies,¹⁵⁸ the High Court clearly conducted both hearings on the basis that the defendant Commonwealth must establish constitutionality.¹⁵⁹

Similarly, in both countries, it has been an article of judicial faith that the courts are never concerned with the wisdom, propriety, or efficacy of an impugned federal emergency measure.¹⁶⁰ The courts do not ask "Will the law *actually* help cope with the emergency?" but rather "Is it within power?" Again, the Australian High Court, while never formally deviating from this orthodox abdication, has modified it significantly. Ever since *Farey v. Burvett*,¹⁶¹ the Court has demanded that it be satisfied not that the Commonwealth law *actually* aids defence, but that the law exhibits some degree of *capability* to assist defence.¹⁶² While, as has been demonstrated, the High Court has liberally recognized such "capability" in times of general war, and once in a time of apprehended war, nevertheless, the Court, even in times of outright general war, has sometimes struck down federal laws because they showed no apparent "capability" to assist defence.¹⁶³

Thus, it may be said that the Australian courts have been more rigorous in their willingness to challenge federal claims of "emergency" as justifying intrusion into state areas of concern. The Canadian courts, on the other hand, have been clearly more accommodating to similar federal actions in Canada. This is not to say that one approach is more right or admirable than the other; it is merely a recognition that, when dealing with the concept of emergency in a federation, one is faced with a dilemma: ought privacy be given to the constitutionally-enshrined balance of power, or ought the central government be allowed an effective, if far-reaching, hand in dealing with national crises? Why the Australian courts should have leaned slightly more in favour of the former, and the Canadian courts more in favour of the latter, is impossible to say.¹⁶⁴ It does illustrate the tension that will forever occur between the "divided jurisdictions" principle of federalism and the "central action means efficient action" principle of emergency.

¹⁵⁸ *Australian Communist Party v. Cth.*, *supra* note 22; the *Capital Issues case*, *supra* note 107.

¹⁵⁹ See the references to the *Communist Party* and *Capital Issues* cases in note 150, *supra*.

¹⁶⁰ In Canada, see the *Japanese-Canadians case*, *supra* note 39, at 101 (A.C.), 585 (D.L.R.) and the *Anti-Inflation Reference*, *supra* note 16, at 424-25 (S.C.R.), 497 (D.L.R.) 255, 262; and the *Capital Issues case*, *supra* note 107, at 219, 240, 256.

¹⁶¹ *Supra* note 40.

¹⁶² See note 58 and the Australian references in note 160, *supra*.

¹⁶³ See notes 59, 60, 61, *supra*, and the references therein.

¹⁶⁴ Perhaps there is one factor which should not be entirely discounted: the fact that the High Court of Australia, like the U.S. Supreme Court but unlike the Supreme Court of Canada, is established by, and is therefore entrenched in, the federal constitution. This may make it not less chary of incurring federal parliamentary displeasure by holding the latter's statutes invalid, but more sensitive to its role as ultimate guardian of the federal system.